APPENDIX

OPINIONS OF THE COURTS BELOW

United States Court of Appeals

FOR THE FOURTH CIRCUIT

NO. 73-2298

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellant,

VERSUS

CLEVELAND MILLS COMPANY,

Appellee.

Appeal From The United States District Court For the Western District of North Carolina, at Shelby. Woodrow W. Jones, District Judge.

Argued February 8, 1974. Decided August 19, 1974

Before Haynsworth, Chief Judge, and Russell and Field Circuit Judges.

Beth L. Don, Attorney, Equal Employment Opportunity Commission, (William A. Carey, General Counsel, Joseph T. Eddins, Acting Associate General Counsel, Beatrice Rosenberg, Charles L. Reischel, Attorneys, Equal Employment Opportunity Commission, on brief) for Appellant; (Milton Smith, General Counsel, Richard Berman, Labor Relations Counsel, Chamber of Com-

merce of the United States of America, Francis V. Lowden, Jr., Anthony J. Obadal, Hunton, Williams, Gay and Gibson, on brief for Chamber of Commerce of the United States of America, as Amicus Curiae); Whiteford S. Blakeney, (Blakeney, Alexander and Machen, on brief) for Appellee.

HAYNSWORTH, Chief Judge

In the District Court, summary judgment was entered for the defendant upon the ground that this action by the Equal Employment Opportunity Commission to remedy allegedly discriminatory employment practices could not be maintained because of time limitations. It construed the Equal Employment Opportunity Act of 1972,[1] amending Title VII of the Civil Rights Act of 1964,[2] which for the first time gave the Commission the right to institute judicial enforcement proceedings, as limiting the newly created right to proceedings commenced within a period of 150 days following the expiration of a period of 30 days after the filing of the administrative charge.[3] We reverse, for we do not find the Commission's right to seek judicial enforcement so circumscribed.

I

These proceedings were begun administratively on August 2, 1968 when one of its members filed with the Commission a charge of racial discrimination against

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1. P.L. 92-261, 86 Stat. 103 (1972).

2. 42 U.S.C.A. §§ 2000e, *et seq.*

3. EEOC v. Cleveland Mills Co., W.D.N.C., 364 F. Supp. 1235.

Cleveland Mills. The proceedings did not move with rapidity. Cleveland was not notified of the filing of the charge until November 28, 1968, and the first conciliation conference was held only on July 15, 1970. On August 17, 1971, more than three years after the filing of the charge, the Commission made a finding of probable cause to believe the charge of past and continuing discrimination by Cleveland. Still, conciliation attempts were continued until November 28, 1972, when the Commission notified the "aggrieved parties" of their right under 42 U.S.C.A. § 2000e-5(f)(1) to commence a private action within 90 days. No such action having been commenced within the allowable time, the Commission commenced this action on March 2, 1973, over four and one-half years after the filing of the charge.

II

During most of the pendency of the administrative proceedings, the Commission had no enforcement powers. After an investigation and a determination of probable cause to believe the respondent was in violation of Title VII of the Civil Rights Act of 1964, the Commission was authorized only to seek voluntary compliance. Its roles were those of the conferee, conciliator and uncoercive persuader. If those processes failed, the Commission was required to notify the aggrieved parties, who, within 30 days after such notice, could file an action for the enforcement of their rights. There was no provision for judicial enforcement except such a private action in the name and at the instance of an aggrieved party filed within the 30-day period.

The enforcement scheme was substantially altered in March 1972 when the administrative proceedings in this case had been pending for more than three and one-half years. The Equal Employment Opportunity Act of 1972 amended 42 U.S.C.A. 2000e-5(f)(1) to read in pertinent part:

> If within thirty days after a charge is filed with the Commission * * *, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. * * * The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission * * *. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge * * * the Commission has not filed a civil action under this section * * * or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission * * * shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. * * * Upon timely application, the court may, in its discretion, permit the Commis-

sion * * * to intervene in such civil action upon certification that the case is of general public importance.
* * *

The text of the section contains no expressed or clearly implied time limitation upon the Commission's right to file a civil action once it has accrued. The first part of the section confers the right of action upon the Commission subject to conditions only, that at least 30 days shall have elapsed from the filing of the charge and that the Commission shall have failed to obtain a conciliation agreement acceptable to it. The latter part of the section confers a private right of action upon the aggrieved person, and that private right of action is closely confined within defined time periods. The private right of action may not be exercised until after the lapse of 180 days from the filing of the charge and the aggrieved person has received notice from the Commission that (1) the charge has been dismissed by the Commission, or (2) that the Commission has not filed a civil action, and (3) that the Commission has not entered into a conciliation agreement to which the aggrieved person is a party. Once the time within which a private action may be filed commences to run, it survives for a period of 90 days, after which it is forever extinguished. This confinement of the private right of action is consistent with the earlier provisions of Title VII of the Civil Rights Act of 1964, in which an aggrieved person had only a 30-day period following the "suit letter" in which to commence a proceeding in court. The newly created right of the Commission to seek judicial enforcement had no such prior history, and the presence of strictures upon the

individual's private right of action does not necessarily import a congressional intention to impose strict time limitations of a comparable nature on the Commission. The 180-day period serves its apparent purpose when it limits the time before which a private action may not be filed and thus avoids potential interference with the Commission in the performance of its primary duties of conciliation and enforcement. One would suppose that if the Congress had intended to cut off the Commission's right of action, it would have included clear language to that effect, just as it did when it clearly expressed its intention to cut off the individual's private right of action.

III

A literal reading of the statute is consistent with its legislative history.

When Congress was considering the Equal Employment Opportunity Act of 1972, it is clear that it was of the opinion that the voluntary system of enforcement, supplemented only by the strictly confined private right of action, had proven inadequate to achieve the objectives of Title VII.[4] There was general agreement upon the need of legislation conferring enforcement powers upon the Commission, and the large area of debate was over the question of whether the Commission should be given the power to enter enforceable orders or whether it should be authorized to maintain actions in the dis-

4. 1972 U.S. Code Cong. & Ad. News 2137, 2139-41.

trict courts.[5] By whatever means, however, the congressional contemplation was that there should be primary reliance upon the powers of enforcement to be conferred upon the Commission, and not upon private lawsuits, to achieve equal employment opportunity.[6]

Congress was well aware of the fact that it was taking the Commission from eighteen to twenty-four months to administratively process a majority of the complaints.[7] It knew of the Commission's accumulated backlog of cases and of the likelihood that the number of filings would continue on the increase.[8] Nor was there any likelihood that the grant of enforcement powers to the Commission would accelerate its performance in seeking the disposition of complaints in the administrative process by voluntary compliance.

These conditions make it highly unlikely that the Congress would have considered the imposition of narrow and precise time limits upon the Commission's right to file an action for judicial enforcement. If it had intended to impose a 180-day cut off on the Commission's right of action, and administrative proceedings dragged on as they had been doing, most of the aggrieved parties

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5. Id at 2167-76.

6. *See* the Conference Committee Section-by-Section Analysis of the Equal Employment Opportunity Act of 1972, 118 Cong. Rec. S. 3462 (March 6, 1972).

7. *See*, House Report No. 92-238, 92d Cong. 1st Sess. 3-5, 12 (1971); and Senate Report No. 92-415, 92d Cong. 1st Sess. 5-6, 87 (1971).

8. 1972 U.S. Code Cong. & Ad. News 2137, 2139-43.

would be denied Commission representation in court and left to their own devices to seek judicial enforcement of their rights. This was the situation the 1972 Act was designed to remedy. On the other hand, if the Commission were driven to commence judicial proceedings before the expiration of 180 days after the receipt of each complaint, attainment of the expressed congressional goal of obtaining voluntary compliance through conciliation and persuasion in most of the cases would be seriously prejudiced. In the administrative process careful study of an employer's employment practices and thorough exploration of all reasonable bases for agreement and compromise may require time. Great haste in filing judicial proceedings before the administrative procedures are mature would result in burdens and disruptions to the Commission and to employers which would hardly be calculated to further the effectiveness of procedures directed toward voluntary compliance. The congressional purpose that the possibilities of voluntary compliance by agreement be first thoroughly explored and the congressional purpose that judicial enforcement proceedings be primarily the province and responsibility of the Commission may be harmonized but not if a 180-day period from the filing of the charge is imposed for the filing of judicial proceedings.

It is suggested by Cleveland that if an employer is engaged in a continuing violation of the Act, the expiration of a 180-day period of limitations would not prevent the filing of a new charge and the commencement of a judicial proceeding founded upon the second charge

within 180 days thereafter. This, however, would necessitate the filing of multiple charges and would further complicate the Commission's work with technicalities serving no useful purpose. If the processes of investigation and conciliation are proceeding actively 180 days after the filing of the charge, the Act's purposes are served by permitting the administrative processes to proceed to completion as rapidly as possible. Discontinuance and disruption in commencing new proceedings would serve no such purpose.

References in the Report of the Conference Committee of March 6, 1972 to the private right of action seem to support our literal reading of the amended section:

> * * * The retention of the private right of action, as amended, is intended to make clear that an individual aggrieved by a violation of Title VII should not be forced to abandon the claim merely because of a decision by the Commission or the Attorney General, as the case may be, that there are insufficient grounds for the Government to file a complaint. Moreover, it is designed to make sure that the person aggrieved does not have to endure lengthy delays if the Commission or Attorney General does not act with due diligence and speed. Accordingly, the provisions described above allow the person aggrieved to elect to pursue his or her own remedy under this title * * *. * * * It is hoped that recourse to the private lawsuit will be the exception and not the rule * * *. However, * * * it is necessary that all avenues be left open for quick and effective relief.

118 Cong. Rec. S. 3462 (March 6, 1972).

The Conference Committee's allusions to the "individual's election" to pursue his or her own remedy if there are long delays in the administrative process and to the necessity "that all avenues be left open for quick and effective relief" support an inference that the Commission's right to sue continues after the individual's right has matured. The allusions indicate that individual standing to sue is designed to let the individual choose between pursuing his own remedy and relying on the representation of the Commission. Clearly, that choice would be illusory if the Commission's right of action had already been extinguished.

IV

A number of district courts have considered this question with varying results.[9] We do not have the bene-

9. Cases finding no limitation include: EEOC v. E. I. duPont de Nemours & Co., Civil No. 4515 (D. Del. March 29, 1974); EEOC v. U. S. Industries, Civil No. 73-283 (W. D. Tenn. Jan. 2, 1974); EEOC v. Huttig Sash and Door Co., 371 F. Supp. 848 (S.D. Ala. 1974); EEOC v. Bartenders Int'l Union, Local 41, 369 F. Supp. 827 (N.D. Cal. 1973); EEOC v. Eagle Iron Works, 367 F. Supp. 817 (S.D. Iowa 1973); EEOC v. Duff Brothers, Inc. 364 F. Supp. 405 (E.D. Tenn. 1973); EEOC v. Mobil Oil Corp., 362 F. Supp. 786 (W.D. Mo. 1973). Cases finding a time limitation on the Commission's right to sue include: EEOC v. Kimberly-Clark Corp., Civil No. 73-42 (W.D. Tenn. March 27, 1974); EEOC v. Griffin Wheel Co., Civil No. 73-H-429-S (N.D. Ala. Feb. 5, 1974); EEOC v. Union Oil Co. of Cal., 369 F. Supp. 579 (N.D. Ala. 1974); EEOC v. Louisville & N.R.R., 368 F. Supp. 633 (N.D. Ala. 1974); and EEOC v. Container Corp. of Am., 352 F. Supp. 262 (N.D. Fla. 1972). Furthermore, another court within this circuit, when faced with the identical issue here reached a conclusion at odds with the District Court in this case. EEOC v. Christianburg Garment Co., Civil No. 74-18 (W.D. Va. May 7, 1974).

fit of any decision from another court of appeals, but we are persuaded that the dual congressional purpose, first, to encourage compliance through conciliation and persuasion, and, second, to place upon the Commission primary responsibility for judicial enforcement proceedings, is inconsistent with Cleveland's contention that the Commission, under the section, loses its right to seek judicial enforcement when the 180-day period following the filing of the charge expires. The text of the statute, what light we can glean from the legislative history and the basic legislative purposes sought to be served all trend against the rigid restriction of the Commission's enforcement power which Cleveland urges upon us.

V

Cleveland understandably expresses concern that if the Commission's right to sue survives the 180-day period, the Commission and the aggrieved individual will have concurrent rights of suit for 90 days. Cleveland argues that this would be inconsistent with congressional and judicial aversion to duplicative litigation, and that only by construing § 706(f)(1) as providing consecutive, limited rights of action can this danger of duplicitous lawsuits be avoided. We need not now undertake the resolution of all of the problems that would arise if the Commission and an aggrieved party each filed an enforcement action during the 90-day period during which private actions are conditionally authorized. It is obvious, however, that the imposition of a 180-day limitation on the Commission's right to sue is not the only answer or even the best means of implementa-

tion of a policy against duplicative lawsuits. In fact, of the alternatives available, imposition of such a limitation is the most difficult to reconcile with the language of the Act and its remedial purposes. Other approaches, more in keeping with the Act and its purposes and equally effective in preventing duplicitous lawsuits, have been adopted by other courts when called upon to meet the problem of duplicitous actions.[10] We need not now choose between those other alternatives, but their existence and apparent harmony with the legislative scheme refutes Cleveland's contention that only by imposing a 180-day limitation on the Commission's right to sue can the danger of duplicitous actions be avoided.

We thus conclude that the 180-day period contained in 42 U.S.C.A. § 2000e-5(f)(1) is referable to the beginning of the time within which an aggrieved party may file a private action, but that its expiration does not finally terminate the Commission's right of action. The decision of the District Court dismissing the Commission's complaint for failure to timely file, therefore, is reversed and the case remanded for further proceedings.

Reversed and Remanded.

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10. Some have held that the Commission's right to sue terminates only when an individual action is actually brought and restrict the individual to intervention as of right once a Commission action has commenced, even during the 90-day period. Others have indicated that the Commission is altogether barred from bringing suit during the individual's 90-day period, but that the Commission's right revives upon expiration of that period should the individual fail to act. *See*, EEOC v. Missouri Pac. R.R., 8 Cir., 493 F. 2d 71 (1974); EEOC v. Huttig Sash & Door Co., 371 F. Supp. 848 (S.D. Ala. 1974); EEOC v. Cronin, 370 F. Supp. 579 (E.D. Mo. 1973); and EEOC v. Union Oil Co., 369 F. Supp. 579 (N.D. Ala. 1974).

IN THE

District Court of the United States

FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
SHELBY DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff.

vs.

CLEVELAND MILLS COMPANY,

Defendant.

CIVIL ACTION NO. SH-73-36

MEMORANDUM OF DECISION

THIS MATTER is before the Court upon the defendant's Motion to Dismiss the action under Rule 12, Federal Rules of Civil Procedure on the grounds that the Court lacks subject matter jurisdiction and the Complaint fails to state a claim upon which relief can be granted. The defendant contends that the plaintiff has failed to comply with the statutory conditions prerequisite to the existence of the alleged cause of action in that it was not filed within 180 days from the filing of the charge with the Commission.

After full consideration of the briefs and arguments of counsel, the Court now enters its findings and conclusions.

The action was instituted in this Court by the filing of a Complaint by the Commission on March 2, 1973, with service of process being had upon the defendant on March 12, 1973. The plaintiff alleges that since July 2, 1965, the defendant was an employer engaged in industry affecting commerce within the meaning of Section 701(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A., 2000(e), et seq., as amended by Public Law 91-261 (March 24, 1972), and was an employer of more than 25 employees at its facilities in this district. The plaintiff further alleges that the defendant since July 2, 1965, has intentionally engaged in employment practices made unlawful by Section 703 of Title VII, by the maintenance of hiring and recruitment practices which discriminate on the basis of race; by limiting employees to less desirable and lower-paying jobs on the basis of race and by segregating employees, by job and department, on the basis of race. The plaintiff further alleges that these practices discriminate against employees and applicants for employment on the basis of race with respect to their compensation, terms, and privileges of employment, and deprives them of equal employment opportunities. The plaintiff seeks injunctive relief against such practices, and the recovery of back wages and such other financial relief as is necessary to eradicate the effects of such past and present unlawful employment practices.

The defendant's Motion to Dismiss is premised upon the alleged failure of the Commission to comply with the conditions precedent as required by the statute. The defendant's attorney presented during oral arguments

and in briefs filed thereafter, facts showing that no claim was filed by any employee of the defendant, but that a Commission member filed a charge on August 7, 1968, almost 5 years ago, and that the defendant was not notified of such charge until November 29, 1968, nearly 4 months later. More than 3 years after the charge, the Commission advised the defendant on August 7, 1971, that "there is not reasonable cause to credit" any of the assertions of the charge, except for the claim that the defendant failed "to hire Negro females as a class because of their race." More than one year later, November 28, 1972, the Commission wrote a letter to each of 10 Negro females to the effect that the Commission had not filed any civil action with respect to their charges as required by Section 706(f) of the Act, 42 U.S.C.A., 2000(e), and that the Commission had not entered into a conciliation agreement to which they were parties. The letter further advised that "therefore, pursuant to Section 706(f) of the Act, you may institute, within 90 days of your receipt of this Notice, a civil action in the United States District Court having jurisdiction over your case."

No employee, former employee, or applicant for employment filed any action within the 90-day period or at any other time.

This action was instituted by the Commission on March 2, 1973, and the defendant was served with process on March 12, 1973, more than 4½ years after the charge was filed. The plaintiff does not dispute these facts, and in its original and reply briefs contends that the 180-day provision of the statute is not a condition precedent to its right to bring this action. It contends that

the action may be brought by the Commission at any time after the charge is filed, except for the first 30 days and for the 90-day period during which the allegedly injured party has the exclusive right. Since both plaintiff and defendant argued and briefed the case as if these facts were properly before the Court on the Motion to Dismiss, the Court will proceed to determine the issue as if the facts were determined under a Motion for Summary Judgment.

The Commission is a creation of the Congress and has no rights or duties other than those conferred by the statute. The original Act did not authorize the Commission to sue, but instead conferred such right upon the aggrieved party exclusively. 42 U.S.C.A., 2000e-5(e). By an amendment which was to become effective March 24, 1972, the Congress re-wrote this section and for the first time authorized the Commission to institute court action, and extended the time period for the aggrieved party to bring action from thirty (30) to ninety (90) days. 42 U.S.C.A., 2000e-5(f)(1). The pertinent part of the 1972 amendment reads:

"If, within thirty days after a charge is filed with the Commission * * *, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent * * * named in the charge. * * * If a charge filed with the Commission * * * is dismissed by the Commission, or *if within one hundred and eighty days from the filing of such charge * * *, the Commission has not filed a civil action under this section * * *, or the Commission*

has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission * * * shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. * * *" (Emphasis added.)

This statute leaves much to be desired in clarity and precision. It is clear, however, that an aggrieved party must bring an action within the time limit set forth in the statute which is now ninety (90) days. The courts have uniformly held, and the Commission agrees, that this requirement is a condition precedent to the jurisdiction of the court. *Stebbins v. Insurance Company,* 469 F. 2d 268 (4th Cir. 1972); *Harris v. National Tea Company,* 454 F. 2d 307 (7th Cir. 1971); *Goodman v. City Products Corp.,* 425 F. 2d 702 (6th Cir. 1970); *Cunningham v. Litton Industries,* 413 F. 2d 887 (9th Cir. 1969); *Miller v. International Paper Company,* 408 F. 2d 283 (5th Cir. 1969); *Choate v. Caterpillar Tractor,* 402 F. 2d 357 (7th Cir. 1968); *Fore v. Telephone Company,* 293 F. Supp. 587 (W. D. N. C. 1968).

The statute clearly provides that "* * * the Commission may bring a civil action against any respondent * * * named in the charge." The use of the permissive verb "may" imports discretion — thus, the Commission was granted the right or option, but was not compelled to bring a civil action against any respondent named in the

charge. If the Commission brings the action, the aggrieved party has a right to intervene. When may the Commission bring such action? The statute says that the Commission may bring such action if it is unable to secure a conciliation agreement from the respondent within thirty days after a charge is filed, or within thirty days after the expiration of any period of reference under Subsection (c) or (d) (State Commissions). The Commission admits that these are conditions precedent to its power and authority to institute actions.

The next question, and the one in issue here, is: How long does the Commission have to bring such actions? The statute is clear that if a charge filed with the Commission pursuant to Subsection (b) is dismissed by the Commission then the aggrieved party shall be notified and his right of action accrues and continues for a period of ninety days. After that, no power to bring action exists either in the Commission or the aggrieved party. If the Commission has reasonable grounds to believe a violation of the Act has occurred and has not (1) within one hundred and eighty days from the filing of the charge or the expiration of any period of reference under Subsection (c) or (d), whichever is later, filed such action under this section; or (2) has not entered into a conciliation agreement to which the aggrieved person is a party, then the Commission shall notify the aggrieved person and his right of action accrues and continues for a period of ninety days. If the aggrieved party brings an action "upon timely application, the court may, in its discretion, permit the Commission * * * to intervene in such civil action upon certification that the case is of general public

importance." Thus, it appears that the Commission's power to institute action ceases if a suit is not filed within one hundred and eighty days from the filing of the charge or the expiration of any period of reference under Subsection (c) or (d), whichever is later. (Subsection (c) or (d) does not apply here.) The power and right to bring a civil action in court is then transferred by the statute to the aggrieved party, or if such charge was filed by a member of the Commission, to the person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

The Commission admits that it has no power to institute an action during the ninety day period in which the aggrieved party has the exclusive right to sue. However, it contends that the power to institute action reverts to the Commission after the expiration of the ninety day period if the aggrieved has not filed suit. This Court does not interpret the statute as granting such power.

A careful examination of the voluminous legislative history of the 1972 Amendment reveals very few clues as to Congressional intent on the exact question involved here. The debate indicates clearly that Congress desired to end discrimination in all employment in the land on account of race, color, religion, sex, or national origin. While most of the controversy in both Houses of Congress centered around the issue of whether the Commission would be given quasi-judicial power to hear and determine complaints and to issue cease and desist orders, or merely be given the right to bring actions in court, it is clear there was no intent expressed anywhere in the de-

bate to confer unlimited power upon the Commission to bring action on a claim regardless of its age.

During the debate there was grave concern expressed over the delays in processing charges and the difficulties encountered by aggrieved parties and respondents alike with stale charges. Fear was expressed that court actions would delay resolution of the problems because of congested dockets. The avowed purpose of the legislation was to bring all employers into compliance. Great emphasis was placed upon compliance rather than court action. The courts were given broad injunctive power and award of damages was played down. The courts were authorized to stay proceedings, upon request, for not more than sixty days to permit further efforts by the Commission to obtain voluntary compliance. Time limits were placed upon the filing of charges and the aggrieved party's right to bring a civil action. The entire debate and the statute itself imply prompt procedures rather than the grant of unlimited authority claimed by the Commission.

This Court holds that the statute contains a limitation upon the Commission's power or authority to bring suit. It is not a statute of time limitation in the ordinary sense. The Commission had no power to sue prior to the 1972 Amendment. The right of action here has life and existence only according to the expressed provisions of the statute which created it. This enactment brought into being rights, duties, and liabilities unknown to the common law, and they exist only to the extent conferred by the statute.

As the Supreme Court said in *United States v. McCord,*

233 U.S., 157, 162, 34 S. Ct. 550, 58 L. Ed. 893, 897 (1914), with reference to another statute:

> "The statute thus creates a new liability and gives a special remedy for it, and upon well-settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself."

The Fifth Cirsuit, in following this well-settled principle, said in *Simon v. United States*, 244 F. 2d 703, 705 (1957), quoting 34 Am. Jur., Section 7, pp. 16-17:

> "A statute which in itself creates a new liability, [giving] an action to enforce it unknown to the common law, and [fixing] the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right."

The Commission seems to contend that the Congress gave it unlimited power to bring about equal employment opportunities in the Nation and that nothing in the statute should be construed as limiting such authority. It is true that Congress conferred upon the Commission the duty and responsibility of enforcing certain important rights contained in the statute, but it is not necessary to rely upon stale charges to accomplish this purpose. The failure of an employer to comply with the Act is a con-

tinuing offense and new charges may be filed and new actions instituted. It is not necessary for the Commission or the courts to be plagued with charges five years old in order to meet the requirements of the law for compliance. Here, the alleged aggrieved parties were given the opportunity to sue and they did not do so. If the Respondent is now in compliance, the ultimate purpose of the law has been accomplished. On the other hand, if the Company is not in compliance, new charges may be filed and a new civil action brought. Current charges would eliminate the problem of dimmed memories of witnesses and lack of employment records dating back to the period of 1965.

The Court concludes that the action was not brought in compliance with the statute, and the Motion to Dismiss will be allowed. An Order dismissing the action will be entered simultaneously herewith.

This the 31st day of August, 1973.

/s/ WOODROW W. JONES

Chief Judge, United States District Court